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7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 EAST WEST BANK, a California
corporation,

12 Plaintiff,

13 v.

14 SUKEERT SHANKER, an individual;
15 AELDRA FINANCIAL, INC., a Delaware
corporation; and DOES 1–10,

16 Defendants.
17

CASE NO. 3:20-CV-07364-WHO

**AELDRA FINANCIAL INC.'S NOTICE
OF MOTION, MOTION, AND
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Filing Date: December 9, 2020

Trial Date: May 2, 2022

Hearing Date: July 7, 2021

Hearing Time: 2:00 p.m.

Courtroom: 2, 17th Floor

Judge: Hon. William H. Orrick

1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:** Please take notice that on
 3 July 7, 2021 at 2:00 p.m. before the Honorable William H. Orrick in the United States District Court
 4 for the Northern District of California, Courtroom 2, located on the 17th Floor of the San Francisco
 5 Courthouse at 450 Golden Gate Avenue, San Francisco, California 94102, or via remote access at the
 6 Court's preference pursuant to the Northern District of California's guidelines regarding the COVID-
 7 19 pandemic, Aeldra Financial, Inc. ("Aeldra") by and through its attorneys will and hereby does
 8 move pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing East West Bank's
 9 ("EWB") fifth cause of action for violation of California Business & Professions Code Sections
 10 17200 *et seq.* ("UCL") from its First Amended Complaint (Dkt.45) ("FAC"). As explained more
 11 fully in the accompanying Memorandum of Points and Authorities, EWB's UCL claim is preempted
 12 by California's Uniform Trade Secrets Act, California Civil Code Sections 3426 *et seq.* ("CUTSA").
 13 Because no amendment could alter preemption, Aeldra respectfully requests that the Court dismiss
 14 EWB's UCL claim with prejudice.


15 This Motion is based on this Notice of Motion, the accompanying Memorandum of Points
 16 and Authorities, EWB's FAC, the April 16, 2021 Declaration of Sukeert Shanker in Support of
 17 Opposition to EWB's Motion for Leave to Amend the Complaint (Dkt 37-2), the Declaration of
 18 Grace Kang in Support of Motion for Leave to Amend Complaint (Dkt. 34-1), all documents attached
 19 to those declarations, all pleadings and papers on file with the Court, the argument of counsel at the
 20 hearing, and any other matters that the Court may properly consider.

21
 22 Date: May 28, 2021

Respectfully submitted,

23 SINGER CASHMAN LLP

24
 25 By:


 Adam S. Cashman
 Walter C. Pfeffer

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

California law is clear that a claim under California Business and Professions Code Sections 17200 *et seq.* (“UCL”) based on the alleged misappropriation of trade secrets is preempted by California’s Uniform Trade Secrets Act, California Civil Code Sections 3426 *et seq.* (“CUTSA”). East West Bank (“EWB”) was informed of this fact on multiple occasions but has nonetheless brought a preempted UCL claim against Aeldra Financial, Inc. (“Aeldra”). The Court should accordingly dismiss EWB’s UCL claim as preempted by CUTSA, without leave to amend.

II. STATEMENT OF RELEVANT FACTS

A. Mr. Shanker Leaves EWB and Finds Aeldra

EWB hired Mr. Shanker on December 22, 2017 to be its Chief Operating Officer in charge of Digital Banking. Apr. 2, 2021 First Am. Compl.¹ (Dkt. 45) (“FAC”) ¶ 27. While at EWB, Mr. Shanker helped develop a software platform called “Velo.” *Id.* at ¶ 29. Mr. Shanker’s employment was terminated on May 1, 2019. *See id.* at Ex. C. Half a year later, on October 29, 2019, Mr. Shanker founded Aeldra. *See* Apr. 16, 2021 Decl. of Sukeert Shanker in Supp. of Opp. to EWB’s Mot. for Leave to Amend the Complaint (Dkt 37-2) (“Sukeert Decl.”) ¶ 3. On July 31, 2020, EWB sent a letter to Mr. Shanker in his capacity as “Founder & CEO” of Aeldra. *Id.* at ¶ 4. This letter, sent more than a year after Mr. Shanker’s termination from EWB and nine months after he founded Aeldra, alleged for the first time that Mr. Shanker had misappropriated trade secrets and breached contracts with EWB by retaining EWB documents after his termination. *Id.* at ¶ 4.

B. EWB’s Complaint

EWB filed suit against Mr. Shanker on October 20, 2020, alleging misappropriation of trade secrets, breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and violation of the UCL. Compl. (Dkt. 1). The Complaint explicitly identifies Aeldra as a direct competitor with EWB and a recipient of the allegedly misappropriated information, but did not name Aeldra as a Defendant. *See id.* at ¶ 40 (“Defendant has created a company called

¹ Aeldra’s fact section cites to EWB’s FAC because a Motion to Dismiss provisionally accepts as true all well-pled factual allegations. *E.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). By doing so, Aeldra does not agree with any factual assertion contained in EWB’s pleading and, in fact, disputes many such assertions.

1 Aeldra ... that purports to offer a service in direct competition to Velo....”), ¶ 41 (“[T]he information
2 that Defendant misappropriated from EWB would be vital to setting up such a directly competing
3 company/application like Aeldra....”).

4 **C. EWB Brings a UCL Claim Despite Knowledge of Preemption**

5 EWB provided Mr. Shanker’s counsel with its proposed FAC on March 29, 2021. Declaration
6 of Grace Kang in Support of Motion for Leave to Amend Complaint (Dkt. 34-1) (“Kang Decl.”) ¶ 8,
7 Ex. 5. By letter dated March 31, 2021, Mr. Shanker’s counsel provided EWB with clear authority
8 showing that its UCL claim, as well as the claims for breach of the implied covenant of good faith
9 and fair dealing and breach of fiduciary duty which EWB asserts against Mr. Shanker individually,
10 are all preempted by CUTSA.² Kang Decl. Ex. 6 at 1–3 (citing numerous cases). EWB responded,
11 without providing a single legal citation, that “EWB has not asserted a claim under CUTSA in this
12 action; therefore there is no preemption by CUTSA.” *Id.* at Ex. 7 at 1. Mr. Shanker’s counsel
13 immediately informed EWB that it was mistaken and summarized several cases directly holding that
14 CUTSA preemption applies regardless of whether a CUTSA claim is asserted. *Id.* at Ex. 8 at 3–4.
15 EWB provided no counterargument, replying simply that “challenges to the merits of a claim should
16 be deferred until after leave to amend is granted.” *Id.* at 1.

17 EWB filed its FAC on May 12, 2021, including its UCL claim and its other preempted counts.
18 FAC ¶¶ 77–80. By EWB’s own pleading, the UCL claim (like the other preempted claims) is
19 premised entirely on allegations that Defendants “misappropriate[ed] EWB’s confidential,
20 proprietary, and trade secret information....” *Id.* at ¶ 77.

21 **III. LEGAL STANDARD**

22 A motion under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the
23 complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is proper under Rule
24 12(b)(6) where there is either a “lack of a cognizable legal theory” or “the absence of sufficient facts
25 alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
26 Cir. 1988). While the court must accept as true all factual allegations, it should exclude any
27

28 ² Although this motion is brought on behalf of Aeldra, the CUTSA preemption analysis applies equally to the preempted claims that EWB has asserted against Mr. Shanker individually.

“conclusory statements” or “[t]hreadbare recitals of the elements.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A motion to dismiss should be granted if the plaintiff fails to proffer “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). If a plaintiff’s allegations do not bring his “claims across the line from conceivable to plausible, the complaint must be dismissed.” *Id.* Leave to amend should be denied where amendment would be futile. *See, e.g., Deadco Petroleum, FKA v. Trafigura AG*, 617 F. App’x 636, 639 (9th Cir. 2015); *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006).

IV. ARGUMENT

A. CUTSA Preempts EWB’s UCL Claim

CUTSA preempts UCL claims that are based on the same nucleus of facts as trade secret misappropriation. *See Waymo LLC v. Uber Technologies, Inc.*, 256 F.Supp.3d 1059, 1062 (N.D. Cal. 2017) (“[CUTSA] supersedes claims—including Section 17200 claims—based on the same nucleus of facts as trade secret misappropriation.”); *Silvaco Data Sys. v. Intel Corp.*, 184 Cal. App. 4th 210, 241 (2010) (“CUTSA bars UCL claims sounding in misappropriation of trade secrets.”); *Prostar Wireless Grp., LLC v. Domino’s Pizza, Inc.*, 360 F. Supp. 3d 994, 1006 (N.D. Cal. 2018) (Orrick, J.) (dismissing UCL and other claims preempted by CUTSA); *Acorn Bay v. CamelBak Products, LLC*, No. C 20-05214, 2020 WL 7664450, at *2–3 (N.D. Cal. Dec. 24, 2020) (dismissing UCL claims preempted by CUTSA); *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 962 (2009) (same); *Alta Devices, Inc. v. LG Electronics, Inc.*, 343 F. Supp. 3d 868 (N.D. Cal. 2018) (same).

EWB’s UCL claim is based exclusively and explicitly on the same facts as its trade secret misappropriation claim. FAC ¶ 77 (“Defendants’ wrongful conduct ... and practices include ... misappropriating EWB’s confidential, proprietary, and trade secret information....”). EWB’s Motion for Preliminary Injunction (Dkt. 51) confirms this: “Defendants’ conduct is actionable under the UCL based upon Shanker’s theft of EWB’s proprietary materials ... and Defendants’ use of EWB’s proprietary materials in the Aeldra digital banking application....” *Id.* at 20. No facts other than the alleged misappropriation of trade secrets are alleged that could possibly support EWB’s UCL claim,

1 and EWB never suggested otherwise during the meet-and-confer process. *See generally* Kang Decl.
 2 Ex. 6. EWB's UCL claim is therefore preempted by CUTSA and must be dismissed.

3 **B. Preemption Applies Regardless of Whether a CUTSA Claim is Pled**

4 In the meet-and-confer process, EWB raised only one argument to support its claim: CUTSA
 5 preemption does not apply where the plaintiff has not pled a CUTSA claim. Kang Decl. Ex. 8 at 1.
 6 EWB is wrong. Preemption applies regardless of whether a CUTSA claim is pled. *NetApp, Inc. v.*
 7 *Nimble Storage, Inc.*, 41 F. Supp. 3d 816, 840 (N.D. Cal. 2014) ("NetApp argues only that
 8 preemption does not apply because NetApp did not plead a CUTSA claim against Reynolds. ... This
 9 argument is meritless."); *Barker v. Insight Global, LLC*, No. 16-cv-07186, 2017 WL 10504692, at
 10 *3–6 (N.D. Cal. Nov. 21, 2017) (dismissing UCL claims as preempted even though CUTSA claims
 11 were not brought); *Total Recall Techs. v. Luckey*, No. C 15-02281, 2016 WL 199796 (N.D. Cal. Jan.
 12 16, 2016) (same). Indeed, the very nature of preemption requires it to apply regardless of how the
 13 pleadings are styled. *See Artec Group, Inc. v. Klimov*, No. 15-cv-03449, 2016 WL 7157635, at *7
 14 (N.D. Cal. Dec. 22, 2016) ("The Court also rejects Plaintiff's argument that preemption should not
 15 apply because Plaintiff does not assert a trade secrets misappropriation claim against Axon. Such a
 16 rule would defeat preemption by allowing plaintiffs to intentionally omit CUTSA claims in favor of
 17 other claims.").

18 **C. Leave to Amend Should Be Denied**

19 EWB's entire case is based on the same nucleus of facts as its trade secret misappropriation
 20 claim, and thus no amendment could possibly cure the preemption issue. Even if EWB sought to
 21 amend its pleading to base its UCL claim on a breach of contract, the UCL claim would still be
 22 preempted because EWB's breach of contract cause of action is based on the same nucleus of
 23 common facts as its trade secret misappropriation claim. *See, e.g.*, FAC ¶ 61 ("Shanker breached his
 24 obligations under the contracts by ... accessing, using, and transmitting the confidential, proprietary,
 25 and trade secret information...."); *see also Deerpoint Group, Inc. v. Agrigenix, LLC*, 345 F. Supp. 3d
 26 1207, 1238 (E.D. Cal. 2018) (dismissing UCL claim as preempted by CUTSA because breach of
 27 contract purportedly supporting plaintiff's UCL claim was based on the same common nucleus of
 28 fact as trade secret misappropriation); *MedImpact Healthcare Sys., Inc. v. IQVIA Inc.*, No. 19-CV-

1 1865, 2020 WL 5064253, at *20 (S.D. Cal. Aug. 27, 2020) (same). Leave to amend should
2 accordingly be denied as futile. *See, e.g., Deadco*, 617 F. App'x at 639; *AmerisourceBergen*, 465
3 F.3d at 951.

4 **V. CONCLUSION**

5 Despite being apprised of the law on multiple occasions, EWB insisted on bringing its
6 preempted UCL claim (and other preempted claims) and forcing Aeldra to brief this clear-cut issue.
7 The Court should dismiss that preempted claim.

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9 Date: May 28, 2021

Respectfully submitted,

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